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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

NATIONAL RAILROAD PASSENGER CORPORATION,
CENTRAL OF GEORGIA RAILWAY COMPANY,
and SOUTHERN RAILWAY COMPANY,
Petitioners,

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners National Railroad Passenger Corporation, Central of Georgia Railway Company, and Southern Railway Company respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case on January 5, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is printed as Appendix A hereto. The unreported order of the District Court is printed as Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1973. On February 9, 1973 that court stayed the issuance of its mandate for a period of thirty days, and on March 9, 1973 the stay was extended to March 22, 1973.[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the Court of Appeals err in reversing the judgment of the District Court and holding that any allegedly injured person may maintain an action in the District Court to enjoin supposed violations of the Rail Passenger Service Act of 1970 (the "Amtrak Act"), despite the provision in Section 307 of the Act that the District Courts shall have jurisdiction to grant such relief "upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives"?

STATUTORY PROVISION INVOLVED

Section 307 of the Amtrak Act [45 U.S.C. § 547] provides as follows:

> *Jurisdiction of the District Courts of the United States to Impose Sanctions.*
>
> (a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities

[1] The stay order is printed as Appendix B hereto.

under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

(b) Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this chapter.

STATEMENT OF THE CASE

This is an action to enjoin the discontinuance of certain trains previously operated by the Central of Georgia Railway Company. Central discontinued the trains under authority of the Amtrak Act (the Rail Passenger Service Act of 1970, 45 U.S.C. § 501 et seq.) after entering into a contract with the National Railroad Passenger Corporation (Amtrak) for assumption by Amtrak of Central's intercity rail passenger service responsibilities. Respondent National Association of Railroad Passengers alleges that this contract violates the terms and purposes of the Amtrak Act because the Act permits only contracts which embrace the entire intercity passenger responsibility of a railroad and Amtrak has not contracted with the Southern Railway Company of which Central is allegedly a part.[2] The suit was said to be brought "pursuant to 28 U.S.C. 1331,

[2] Complaint, p. 3.

1337, and 45 U.S.C. 501 et seq., and particularly sections 564(a) and 642 of Title 45."[3]

On May 5, 1971, the District Court for the District of Columbia (Honorable John H. Pratt) dismissed the complaint. Aware that five days earlier Judge Howard F. Corcoran of the same court had issued a detailed opinion concluding that Section 307 of the Amtrak Act barred suit by another passenger association to enjoin certain other train discontinuances,[4] Judge Pratt simply entered a brief order (Appendix C hereto) declaring, *inter alia,* "that the plaintiff does not [have] standing to maintain this action under Section 307 of the Rail Passenger [Service] Act of 1970."

The Court of Appeals reversed and remanded the case to the District Court with instructions to proceed to an adjudication on the merits. In an opinion by Circuit Judge J. Skelly Wright, in which Chief Judge Bazelon and Circuit Judge Wilkey concurred, the court concluded that plaintiff's standing to sue Amtrak and the defendant railroads should be determined by the same three-part standard that governs standing to sue government agencies and that the first two tests of the standard—(1) whether plaintiff has alleged that he suffered injury in fact and (2) whether he is arguably within the zone of interests to be protected—are easily satisfied in the present case. As to the third test, the court could see no convincing evidence that Congress intended to preclude judicial review, the legislative history of Section 307 cited by

[3] Complaint, p. 4.

[4] *Potomac Passengers Association* v. *Chesapeake & Ohio Railway Co., et al., opinion sub nom Congress of Railway Unions* v. *Hodgson,* 326 F. Supp. 68 (D.D.C. 1971).

petitioners being regarded as inconclusive and ambivalent. The court further held that plaintiff's right to sue could be sustained whether the case is analyzed in terms of jurisdiction, existence of a private right of action, or reviewability of administrative action.[5]

REASONS FOR GRANTING THE WRIT

I. THE PROPER CONSTRUCTION OF SECTION 307 OF THE AMTRAK ACT IS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE PROMPTLY AND DEFINITIVELY RESOLVED BY THIS COURT.

A. Section 307 Is Critically Important to the Operation of the Entire Congressional Program for Saving Intercity Rail Passenger Service.

On October 14, 1970, Congress enacted the Rail Passenger Service Act of 1970 because "this nation is faced with the immediate threat of complete curtailment of rail passenger service . . ." and thus "positive action and a completely new direction is required—and urgently required now."[6] The Act provided for creation[7] of a National Railroad Passenger Corporation ("Amtrak") to provide intercity rail passenger service between points designated by the Secretary

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[5] In the same opinion the Court of Appeals reversed the judgment of the District Court in the *Potomac Passengers* case, *supra* n. 4, consolidated with this case on appeal. The court held that Section 307 was not involved in that case since the suit, properly conceived, was not one for violation of the Amtrak Act but rather an action for a declaratory judgment that certain trains were "commuter" rather than "intercity" and that their discontinuance was therefore not governed by the Amtrak Act. The correctness of that decision is not at issue here.

[6] House Report No. 91-1580, 1970 *U.S. Code Cong. and Adm. News*, pp. 4736-37.

[7] 45 U.S.C. § 541.

of Transportation as components of a basic national system of intercity rail service.[8] Though vested with wide discretionary authority under the Act, Amtrak is not "an agency or establishment of the United States Government."[9]

Under the Act, Amtrak was authorized to contract with any railroad, on or before May 1, 1971, and between March 1, 1973 and January 1, 1975, to relieve that railroad of its entire responsibility for provision of intercity rail passenger service.[10] Upon entering into such a contract, the railroad could discontinue any intercity train simply by filing with the Interstate Commerce Commission and posting in required places a thirty-day notice of intent to discontinue.[11] Railroads which have not entered into such contracts are forbidden to discontinue any intercity passenger trains before January 1, 1975, and may do so thereafter only by following the discontinuance procedures in Section 13a of the Interstate Commerce Act (49 U.S.C. § 13a).[12] Amtrak is required to provide the service included within the basic system until July 1, 1973, after which it may effect discontinuances as provided in the Act.[13] If "consistent with prudent management," Amtrak may provide intercity rail passenger service in excess of the basic system, and may discon-

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[8] 45 U.S.C. § 521.

[9] 45 U.S.C. § 541.

[10] 45 U.S.C. § 561(a)(1).

[11] *Id.*

[12] 45 U.S.C. § 564(a).

[13] 45 U.S.C. § 564(b).

tinue such service at any time, except that any excess service provided for a continuous period of two years becomes part of the basic system.[14]

In setting up these arrangements, Congress was keenly aware that Amtrak would have to effect a substantial "pairing of uneconomic routes" in order to preserve a viable rail passenger system in this country.[15] Congress also knew that train discontinuances had previously been the subject of "protracted administrative and judicial proceedings" and that members of the public had become increasingly vocal in protesting railroad service which they did not like.[16] Thus Congress realized that the numerous train discontinuances which Amtrak would have to make would certainly spark a widespread round of protest and that passengers whose trains were terminated would undoubtedly feel upset and sue to enjoin such discontinuances if allowed to do so.[17] In addition, of course,

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[14] 45 U.S.C. §§ 563(a), 564(b)(2).

[15] "A rational reduction of the present system will be required to save any passenger service." House Report No. 91-1580, 1970 *U.S. Code Cong. and Adm. News* p. 4737.

[16] Senate Report No. 91-765, 91st Cong., 2nd Sess. (1970), pp. 2-4.

[17] *Compare* District Judge John P. Fullam's observation, quoted in *In re Penn Central Transportation Co.*, 446 F.2d 1109, 1113 (3rd Cir. 1971), *cert. denied* — U.S. — (1972):

> "It is a matter of common knowledge that very many interested persons and governmental entities and agencies question the adequacy of intercity rail passenger service proposed to be supplied by Railpax [Amtrak]. It is not inconceivable that, if they were free to do so, large numbers of such persons, entities and groups might seek to litigate particular issues in a wide variety of forums."

Amtrak and its participating railroads could conceivably be sued for a variety of alleged violations other than discontinuances.

Knowing that such a wave of injunctive actions could easily cripple the bold and innovative railroad reorganization which Amtrak was created to accomplish, Congress included in the statute Section 307 which grants to the District Courts jurisdiction, *upon petition of the Attorney General,* to enjoin any violation of the Act, or any conduct inconsistent with its policies and purposes, committed by Amtrak or any railroad.[18] This provision was taken almost verbatim from Section 403 of the Communications Satellite Act of 1962 (47 U.S.C. § 743) which appoints the Attorney General as a public watchdog "to take appropriate action to safeguard the public interest" with respect to operations of the Communications Satellite Corporation ("Comsat").[19]

Clearly Section 307 of the Amtrak Act was designed to safeguard the public from possible abuses in the

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[18] Section 307 also permits the granting of equitable relief "in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives." Since the present case, like most of those in which passenger groups are interested, does not involve a labor agreement, constant repetition of this second, labor branch of Section 307 will henceforth be avoided wherever possible.

[19] Remarks of Senator Hubert Humphrey during floor debate on the Comsat Act, 108 *Cong. Record* p. 16,697 (Aug. 16, 1962). See also remarks of Senator Albert Gore, 108 *Cong. Record* p. 15,134 (July 31, 1962), and letter of Deputy Attorney General Katzenbach introduced by Senator Mansfield, 108 *Cong. Record,* p. 11,902 (July 27, 1962).

Amtrak program while nevertheless protecting the Corporation from massive litigation prompted by the inevitable train discontinuances and other actions by Amtrak in carrying out its mandate. The section is intimately related to other provisions of the Act barring judicial review of the basic system [20] and providing for greatly simplified discontinuance procedures.[21] In short, the limitations imposed by Section 307 are absolutely critical to the entire operation of the Amtrak program. The present Court of Appeals' decision holding that, despite Section 307, Amtrak may be sued by any railroad passenger who claims to be injured by an alleged violation of the Act [22] effectively emasculates the very purpose underlying that section and threatens substantial, if not fatal, interference with a vital Congressional program for saving this country's intercity rail passenger system.

B. The Construction of Section 307 Is a Threshold Question in Several Pending and Anticipated Federal Cases.

The question of who may sue Amtrak (or a railroad participating in the Amtrak program) is a threshold issue in every action [23] in which a plaintiff other than the Attorney General seeks an injunction for an alleged violation of the Amtrak Act. At least six such actions involving Section 307 are now pending in federal

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[20] 45 U.S.C. § 522.

[21] See text at note 11 *supra*.

[22] App. A, pp. 8a, 27a.

[23] Except for labor cases (see note 18 *supra*).

courts,[24] and it is certain that more actions presenting the issue will be filed soon.[25]

Federal courts presented with such cases are currently faced with a substantial conflict of authority.[26] On the one hand, there is the instant decision and a similar, earlier ruling by the District Court in *Wood* v. *National Railroad Passenger Corporation,* 341 F. Supp. 908 (D. Conn. 1972). On the other hand, the view that such suits may be brought only by the Attorney General, except in labor cases, finds significant support in the three-judge district court opinion in *Quincy College and Seminary Corporation* v. *Burling-*

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[24] These actions are *Schuler, et al.* v. *National Railroad Passenger Corporation, et al.*, No. 72-CV-211 (N.D.N.Y.); *City of New York* v. *National Railroad Passenger Corporation, et al.*, No. 72 Civ. 1988 (S.D.N.Y.); *City of Philadelphia, et al.* v. *Baker, et al.*, No. 71-1002 (E.D. Pa.); *Commonwealth of Pennsylvania, et al.* v. *Baker, et al.*, No. 71-2301 (E.D. Pa); *People of the State of Illinois, et al.* v. *Chicago & North Western Transportation Company*, No. 71C-1009 (N.D. Ill.); and the instant *National Association of Railroad Passengers* v. *Central of Georgia Railway Company, et al.*, No. 71-1546 (C.A.D.C.).

[25] The pending 307 actions were prompted by the first round of Amtrak contracts executed prior to May 1, 1971. Amtrak has recently entered its second contracting phase, *i.e.*, from March 1, 1973 to January 1, 1975, and railroads which sign on with Amtrak during this period are entitled to discontinue trains in the same fashion as those which contracted during the first phase. (45 U.S.C. § 561). In addition, trains within the basic system may be discontinued by Amtrak after July 1, 1973. (45 U.S.C. § 564).

[26] At least one district judge has already indicated to counsel in another Amtrak case that he intends to await this Court's disposition of the present certiorari petition before making any further decisions in his case. *See* letter of United States District Judge James T. Foley concerning *Schuler* v. *National Railroad Passenger Corporation*, Civil Action No. 72-CV-211 (N.D.N.Y.), set out as Appendix D to this petition.

ton Northern, Inc., 328 F. Supp. 808 (N.D. Ill. 1971), *aff'd* 405 U.S. 906 (1972), which upheld the constitutionality of the Amtrak Act partly on the basis of Section 307's grant *to the Attorney General* of authority to seek equitable relief if Amtrak acts contrary to the policies of the Act.[27]

In addition, there is a clear disagreement among the Courts of Appeals on the "public" status of Amtrak. In deciding to apply to Amtrak the same tripartite standing standard developed by this Court in regard to review of action by governmental agencies, *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970), and *Barlow* v. *Collins*, 397 U.S. 159 (1970), the court below relies strongly on its conclusion that Amtrak is "quasi-public" in character.[28] Yet, in *Miltenberger* v. *Chesapeake & Ohio Railway Co.*, 450 F.2d 971, 974-5 (4th Cir. 1971), the court refused to include Amtrak within

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[27] "A careful reading of the Act demonstrates that sufficient standards and safeguards have been set out by Congress. For instance, under § 308, 45 U.S.C. § 548, Amtrak is required to submit to the President and Congress detailed annual reports of its operations, activities, and accomplishments. In addition, it is made subject to the same safety regulations and labor laws as other common carriers. 45 U.S.C. § 546(b). Also, rail passenger service in excess of the basic system, if implemented, must be 'consistent with prudent management.' 45 U.S.C. § 563(a). *Finally, if Amtrak should not act consistently with the policies of the Act, the United States Attorney General is authorized to go into federal district court to obtain equitable relief.* 45 U.S.C. § 547." (328 F. Supp. at 811, emphasis added.)

[28] Although the point was not discussed by the Court of Appeals, since Section 307 speaks of relief against the Corporation *or any railroad*, the effect of this opinion is also to apply the government agency standing test to the 21 wholly private railroads which have contracted with Amtrak, and even to railroads such as petitioner Southern which have not contracted with Amtrak at all. See App. A, p. 24a.

the reach of certain statutes relating to federal agencies (specifically, the National Environmental Policy Act and the National Historic Preservation Act), noting that Congress' declaration that Amtrak is not a government agency must be honored.

Petitioners submit that the proper interpretation of Section 307 of the Amtrak Act is an issue which is now appropriate for decision by this Court. The Act is passed, the legislative history is complete, and there will be no substantial evidence or insight available later which is not available now. Since the question is a threshold one in several pieces of complex, time-consuming, and expensive litigation, the interests of judicial economy and fairness to all parties militate in favor of as prompt a disposition by this Court as possible.

II. THE COURT OF APPEALS DECISION SERIOUSLY MISCONSTRUES SECTION 307.

While normally, of course, erroneousness of the decision below is not alone a sufficient reason for exercise of this Court's certiorari jurisdiction, there are situations in which granting the writ is an appropriate and necessary method of correcting a serious error, especially when the error threatens substantial interference with a major Congressional program or policy. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 136 (1968); *Williams* v. *Lee*, 358 U.S. 217, 218 (1959). Perhaps because it approached the question with "a strong presumption" in favor of the result reached,[29] petitioners believe the court below seriously misconstrued the plain words of Section 307 and misinterpreted its legislative history, with the con-

[29] App. A, p. 9a.

sequence that a major Congressional program will be subject to serious disruption if the decision below is allowed to stand.

A. The Statutory Language.

Section 307(a) expressly identifies three proper plaintiffs entitled to bring injunctive suits to restrain violations of the Act—the Attorney General (in all cases), or (in cases involving a labor agreement) an affected employee or an employee representative. The section does not identify any class of persons which includes the plaintiff in this case. By the well established principle of *expressio unius est exclusio alterius,* the plain words of the statute indicate that respondent passenger association is not a proper plaintiff. Where Congress expressly provides a particular way of redressing violations of a Congressional enactment, other methods are not to be inferred.[30]

The Court of Appeals' opinion deprecates the weight to be accorded this principle in construing the words chosen by Congress to carry out its legislative intent.[31] But while any rule of statutory construction can undoubtedly be overridden in particular circumstances, general guidelines of this character play a necessary role in construing statutes[32] and should not

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[30] See, *e.g., Calhoun* v. *Harvey*, 379 U.S. 134 (1964); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Blancy* v. *Florida National Bank*, 357 F.2d 27 (5th Cir. 1966); *Powell* v. *Washington Post Co.*, 267 F.2d 651 (D.C. Cir. 1959), *cert. denied*, 360 U.S. 930.

[31] App. A, p. 10a.

[32] The effect of specific designation of a remedy has long been recognized by this Court. See, for example, *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 301 (1943): "All constitutional questions aside, it is for Congress

be ignored unless there is definite indication of a contrary legislative intent.[33] In the present case, the legislative history is compelling that Congress meant exactly what it said.

B. The Legislative History.

In June 1970 a subcommittee of the House Interstate and Foreign Commerce Committee held hearings on H.R. 17849 and S. 3706, the House and Senate bills relating to revitalization of passenger railroads. Representatives of organized labor proposed that Section 307(a) as then drafted[34] should be expanded to reach

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to determine how the rights which it creates shall be enforced . . . In such a case the specification of one remedy normally excludes another." See also *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 720 (1967): "When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied."

[33] The court below asserted that Congress would have included the word "only" in Section 307 if it desired to restrict non-labor suits to the Attorney General. Yet Congress' specification of a particular mode of judicial review of administrative action automatically establishes the exclusive review method, and this result does not depend on the use of the word "exclusive" in the statute. *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349 (3rd Cir. 1972), *cert. denied* 93 S.Ct. 937 (Jan. 15, 1973). See also *Bohart-McCaslin Ventures, Inc.* v. *Midwestern Securities Corp.*, — F. Supp. — (N.D. Tex., Jan. 9, 1973).

[34] "If the Corporation engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this Act, obstructs or interferes with any activities authorized by this Act (except in the exercise of labor practices not otherwise proscribed by law), refuses, fails, or neglects to discharge its duties and responsibilities under this Act, or threatens any such violation, obstruction, interference, refusal, failure or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attor-

all participating railroads, not just Amtrak; that damages, attorneys' fees, and costs should be allowed instead of just equitable relief; and that the identification of who may file a petition for such relief should be broadened to include "any person adversely affected or aggrieved thereby, including the representatives of the employees of any railroad or of the Corporation." [35] In explaining the purpose of the proposed amendment, one of the labor witnesses stated:

> The . . . amendment we propose would modify the language of Section 307(a) . . . so as to provide that any aggrieved party, including employee representatives, could institute legal proceedings for violations of the law. . . .
>
> *As the bill now reads, only the Attorney General, except in cases involving a labor agreement, could bring actions.*[36]

Later, Secretary of Transportation Volpe was asked to comment on these and other proposed changes. His response, in the form of a letter to the Subcommittee, contained the following recommendations:

> Labor proposes that subsection (a) of section 307 be amended to make sanctions available not only against the Corporation but against all railroads. It also proposes that any person adversely affected or grieved, including employee representatives, be permitted to seek relief.

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ney General of the United States or, in a case involving a labor agreement, upon petition of any individual affected thereby, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat."

[Supplemental Hearings on H.R. 17849 and S. 3706 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2nd Sess. (1970), Serial 91-62, p. 43.]

[35] *Id.* pp. 122, 141.

[36] *Id.* p. 134 (emphasis added).

> Sanctions are normally imposed by the Government. Consequently, *I would be opposed to permitting "any person" to seek enforcement of section 307. I would have no objection, however, if the section were revised to permit employee representatives, as well as employees affected, to seek equitable relief.*[37]

If one compares the original language of Section 307 (footnote 34 *supra*) and the two labor proposals with Section 307 as enacted it becomes crystal clear what determinations Congress made in enacting this provision. As to the question of who should be allowed to bring lawsuits, Congress did *not* follow labor's recommendation that "any person adversely affected or aggrieved" be permitted to file a petition under Section 307. But Congress did not ignore labor's suggestions; rather it expanded the draft version of Section 307 to permit suits by "duly authorized employee representatives" in cases involving labor agreements. In short, Congress went precisely as far, and no farther, than Secretary Volpe recommended.[38]

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[37] *Id.*, p. 85 (emphasis added).

[38] Under the Act the Secretary of Transportation has wide responsibility for setting up and supervising the Amtrak program. (*See*, e.g., 45 U.S.C. §§ 521, 522, 548, 563, 602, 621, 645). As this Court has noted, courts customarily respect construction of an administrative statute given "by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961). Additionally, as petitioners informed the Court of Appeals, the Attorney General has taken the position that he has the exclusive right to petition for injunctions in all Amtrak Act cases except those involving labor agreements. *See* Supplemental Appendix to Brief of Appellee National Railroad Passenger Corporation, set out as Appendix E hereto.

C. The Court of Appeals Analysis.

The Court of Appeals opinion seems to petitioners to strain mightily to avoid the clear import of this statutory language and legislative history. In the court's view, Congress may have chosen to reject the "any person" language proposed by labor, not because it wished to foreclose such suits, but because it did not see anything in Section 307 to bar them.[39] Thus, the court adopts a novel construction under which Section 307 gives the Attorney General (and employees and their representatives) the right to seek injunctions for violations of the Act *and* for any action, practice, or policy which, though not a direct violation, is nonetheless inconsistent with the purpose of the Act, while *other* injured parties, including affected railroad passengers and associations, may only seek injunctions to restrain actual violations. These latter suits may be brought, the court holds, not under Section 307 of the Amtrak Act, but under 28 U.S.C. § 1337.[40]

It seems to petitioners that this interpretation of the Act proves too much. Section 307 is entitled "Jurisdiction of the district courts of the United States to impose sanctions." Such a specific jurisdictional grant in a particular Congressional enactment must supersede the general jurisdictional grant of 28 U.S.C. § 1337.[41] If this were not so, the tremendous prolifera-

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[39] App. A, p. 17a.

[40] "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

[41] *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943), cited by petitioners for this proposition, is distinguished by the court on the grounds that judicial review was there unnecessary to prevent obliteration of a Congressionally created right

tion of statutes enacted under the commerce clause would virtually guarantee that, regardless of what specific jurisdictional provisions Congress might insert in particular statutes, any allegedly injured party could gain entry to federal court by relating his claim to some act of Congress affecting trade or commerce.

Furthermore, even assuming that Section 1337 provides a jurisdictional basis for suit, which we deny, the question still remains whether a passenger association has an enforceable cause of action on which to sue? Section 1337 provides for suits "arising under any Act of Congress regulating commerce." Thus, we are once again remanded to the Amtrak Act to see if that Act gives rise to any such private cause of action as respondent here asserts. There clearly is no section of the Act which does so. The section which does expressly create rights of action—Section 307—vests them in the Attorney General and, in labor cases, affected employees and representatives.[42]

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because a neutral agency (the Mediation Board), was already acting to resolve disputes administratively. Similarly, here two neutral agencies (the Departments of Transportation and Justice) are actively involved in establishing the Amtrak program and monitoring its operation, and there is also limited judicial review through the Attorney General and all affected employees. The court also noted that *Switchmen's* grew out of a field relegated to conciliation and mediation rather than judicial review, whereas railroad discontinuances have long been subject to administrative and judicial review. But the Amtrak Act expressly embodies a radical departure from past practice—under 45 U.S.C. § 561(a), any railroad participating in the Amtrak program need only file a thirty-day notice to discontinue an intercity train, the old hearing and review procedure of Section 13a of the Interstate Commerce Act having been totally dispensed with.

[42] Cases such as *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), and *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), cited by the Court of Appeals for implying such a private right of action here are inapposite. Unlike the Securities Exchange Act of 1934

The Court of Appeals reasoned that a broad right of private plaintiffs to sue was necessary in order to insure that Congress' objective of saving passenger train service is met by complete compliance with the terms of the Act. The court implicitly concluded that the Attorney General simply could not adequately monitor the possible situations in which Amtrak Act violations may occur. That, we submit, is entirely erroneous.[43] Moreover, issues as to alleged violation of the Amtrak Act, which involve matters of statutory construction and overall implementation of the program, are peculiarly the kinds of issues which the Department of Justice

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or the Voting Rights Act of 1965, the Amtrak Act does not seek to establish positive, enforceable rights in a broad class of individuals but attempts to rescue a threatened national resource by creating a new institution (Amtrak) to provide intercity rail passenger service. The Act is not ambiguous; it clearly defines who may bring enforcement actions—the Attorney General. And the scope of possible violations is well within the Attorney General's enforcement power—while there may annually be hundreds or thousands of Security Act violations or voting frauds throughout the country, the suits alleging violations of the Amtrak statute are not so numerous as to suggest that the Attorney General cannot monitor the way Amtrak is conducting its business and bring suits therefor if necessary. In such circumstances, no private right of action should be implied. *Calhoun* v. *Harvey*, 379 U.S. 134 (1964); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *B. F. Goodrich Co.* v. *Northwestern Industries, Inc.*, 424 F.2d 1349 (3rd Cir. 1970), *cert. denied* 400 U.S. 822; *Blaney* v. *Florida National Bank*, 357 F.2d 27 (5th Cir. 1966); *Noel Estate, Inc.* v. *Commercial National Bank of Shreveport*, 232 F.2d 483 (5th Cir. 1956).

[43] The Department of Justice has established an Amtrak section to review claims of improper actions by Amtrak or the railroads and to participate in federal court proceedings where appropriate. (See Appendix E hereto). In the instant case, attorneys in that section *did* study the complaint of respondent National Association of Railroad Passengers and concluded that the Amtrak-Central of Georgia contract does not violate the Act. (Supplemental Memorandum of Appellee National Railroad Passenger Corporation, p. 5).

can and should consider, together with the Department of Transportation, thus promoting a rational and unified conception of the Act's provisions which will protect the program from inconsistent and debilitating litigation instituted by various private parties across the country.

Because this is so, successful implementation of the legislative scheme required Congress to include within the framework of the Act a provision to insure that enforcement actions would be brought only by an informed governmental agency acting in the exercise of its discretion and with due regard for the overall administration of the Amtrak legislation. Section 307, appointing the Attorney General as the public's overseer of Amtrak's conduct under the Act, is that provision.

CONCLUSION

The interpretation of Section 307 reached by the Court of Appeals does not square with the plain words of the statute, its legislative history, or a proper conception of the purpose of the Act. Indeed, that interpretation threatens to emasculate a key part of the entire statutory scheme. The issue is a pure question of statutory construction and does not require further consideration and refinement by lower courts prior to disposition by this Court. It is a threshold question in a number of pending and anticipated federal cases which, if allowed to proceed on their merits, will be complex, time-consuming, and expensive. In sum, implementation of the Congressional program for saving intercity passenger rail service requires as speedy a reversal by this Court as possible.

The Amtrak Act was designed by Congress to deal with a virtual emergency situation in the nation's rail-

road service. As noted by the Court of Appeals for the Third Circuit,

> *It has become painfully apparent that the condition of the nation's railroads is eroding daily.* Services are being cut back, existing services are deteriorating, and the availability of working capital has become critically limited. Reacting to an ever worsening rail passenger crisis, Congress enacted the Rail Passenger Service Act of 1970, supra. . . . *The legislative history of the Act and the findings therein make clear that Congress regarded as imperative the timely implementation of the Act.*
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> *In Re Penn Central Transportation Co.*, 457 F.2d 381, 386 (3rd Cir. 1972), emphasis added.

For all these reasons, petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

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APPENDIX A

[Court of Appeals Opinion and Judgment]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1321

POTOMAC PASSENGERS ASSOCIATION, APPELLANT

v.

CHESAPEAKE & OHIO RAILWAY COMPANY AND BALTIMORE & OHIO RAILROAD COMPANY

No. 71-1546

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, APPELLANT

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY AND NATIONAL RAILROAD PASSENGER CORPORATION

Appeals from the United States District Court
for the District of Columbia

Decided January 5, 1973

Messrs. Pierre E. Dostert and *Gordon P. MacDougall* for appellants.

Mr. Charles A. Horsky, with whom *Mr. William D. Iverson* was on the brief, for appellees Central of Georgia Railway Company and Southern Railway Company.

Mr. William O. Bittman, with whom *Mr. Curtis E. von Kann* was on the brief, for appellee National Railroad Passenger Corporation.

Mr. Robert O. Smith, Jr. was on the brief for appellees Chesapeake & Ohio Railway Company and Baltimore & Ohio Railroad Company. *Messrs. Francis M. Shea* and *Richard T. Conway* also entered appearances for appellees in No. 71-1321.

Before BAZELON, *Chief Judge,* and WRIGHT and WILKEY, *Circuit Judges.*

WRIGHT, *Circuit Judge:* This consolidated appeal consists of two separate cases, each concerning interpretation of the recently enacted Rail Passenger Service Act of 1970, 45 U.S.C. § 501 *et seq.* (1970) (hereinafter referred to as the Amtrak Act). These cases were initially consolidated because it appeared that they presented the same or closely related legal issues, namely (1) whether parties other than the Attorney General, employees and employee representatives have standing to sue the National Rail Passenger Service Corporation (hereinafter Amtrak) or individual railroads for violations of the Amtrak Act; (2) whether federal district courts have jurisdiction over suits brought by litigants other than the Attorney General, employees and employee representatives to enjoin Amtrak or individual railroads from violating the Amtrak Act; and (3) whether the Amtrak Act creates a private right of action in favor of parties injured by violations of the Act.

It now appears, however, that the appeal in No. 71-1321 involves a question much different from those listed above,

namely: Does a federal district court have jurisdiction to determine whether a specific train provides "intercity rail passenger service" or "commuter and other short-haul service" within the meaning of the Amtrak Act? If the train provides "intercity rail passenger service" it may properly be discontinued under the authority of the Amtrak Act without any review by the regulatory commissions of the states through which it passes or by the Interstate Commerce Commission. If it provides "commuter and other short-haul service," on the other hand, its discontinuance is neither authorized nor prohibited by the Amtrak Act, but rather is subject to the pre-existing jurisdiction of state regulatory commissions or the ICC. To avoid any further confusion between the issues involved in these two cases, our opinion will treat each case separately.

No. 71-1546

This case requires us to decide whether injured and aggrieved parties have standing to seek injunctions against violations of the Amtrak Act, or whether Section 307 of the Act, 45 U.S.C. § 547, bars suits by all parties other than the Attorney General of the United States, employees and employee representatives. Since the case is here on an appeal from a dismissal for lack of standing to sue and the District Court never reached the merits, we may accept plaintiff's-appellant's version of the facts. Appellee Central of Georgia Railway Company (Central) filed a notice of discontinuance [1] for its "Nancy Hanks" passen-

[1] The Act requires that railroads discontinuing trains give notice in accordance with the notice procedures in § 13a(1) of the Interstate Commerce Act, 49 U.S.C. § 13a(1) (1970). *See* 45 U.S.C. § 561(a)(1) (1970). Since the purpose of the Act is to allow discontinuances of intercity rail passenger service without approval of either the ICC or state regulatory agencies, this notice does not invoke the jurisdiction of the ICC; it merely serves to give passengers advance warning

ger train which operates between Savannah and Atlanta, Georgia, and for two other trains operating between Albany and Birmingham, Georgia. Appellant National Association of Railroad Passengers, a national organization of railroad patrons, sought to enjoin the discontinuances on the ground that they violated Sections 404(a) and 802 of the Amtrak Act, 45 U.S.C. §§ 564(a) and 642.

Section 802 provides that "no railroad may discontinue any intercity rail passenger service whatsoever other than in accordance with the provisions of this chapter • • •." Section 404(a) bars a railroad from discontinuing any of its intercity passenger trains prior to January 1, 1975, unless that railroad has entered into a contract with Amtrak pursuant to Section 401(a)(1) of the Act, 45 U.S.C. § 561(a)(1). The latter provision authorizes Amtrak to contract with a railroad "to relieve the railroad • • • of its entire responsibility for the provision of intercity rail passenger service." Although Central has entered into a contract with appellee Amtrak to relieve Central of its entire responsibility for intercity rail passenger service, appellant contends that Central and Amtrak have not complied with Section 401(a)(1) because Central is but a subsidiary of appellee Southern Railway Company (Southern) which has not entered into a contract with Amtrak. In appellant's view, then, the Act requires that Amtrak either enter into a contract to relieve Southern of its entire responsibility for intercity rail passenger service or enter into no contract at all. After oral argument on appellant's motion for a temporary restraining order, the District Court dismissed the action on the ground that appellant did not have standing to maintain this action under Section 307 of the Act. We reverse and remand.

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of the discontinuance. *See* Ex Parte Order No. 217, 36 FED. REG. 5219, 5220 (March 18, 1971); 49 C.F.R. § 1122.9 (Oct. 1, 1972).

I

The parties have suggested several characterizations of the issue presented. Appellant accepts the "standing" characterization employed by the District Court. Central and Southern suggest that this is incorrect and that the real issue is whether a private right of action exists to restrain an alleged violation of the Amtrak Act. Amtrak suggests that the issues are, first, whether the District Court has jurisdiction to entertain this action at the instance of this plaintiff and, second, whether the action of Amtrak and the railroads is reviewable at the behest of this plaintiff.

The fine distinctions among the doctrines of standing, jurisdiction, reviewability, and causes of action often pose thorny problems for the law. *Compare Data Processing Service* v. *Camp,* 397 U.S. 150 (1970), *with Barlow* v. *Collins,* 397 U.S. 159, 167 (Mr. Justice Brennan, concurring in the result and dissenting). *Compare Bell* v. *Hood,* 327 U.S. 678, 679 (1946) (majority opinion), *with id.* at 685 (Mr. Chief Justice Stone, dissenting). Fortunately, however, we need not resolve these problems here, for in this case analysis of all these doctrines leads to the same conclusion—allowing adjudication of the merits. Our opinion focuses on standing, but we will also demonstrate that analyzing the case under the doctrines of jurisdiction, reviewability, and private causes of action achieves an identical result.

II

At the outset, we reject the position that the doctrine of standing is wholly inapplicable to this case. It is argued that the standing doctrine has developed solely in the context of determining what persons or groups may challenge the action of a government official or agency, a matter not involved in this case since the Amtrak Act specifically provides that Amtrak is not an agency or instrumentality of

the federal government. *See* 45 U.S.C. § 541. Most applications of the doctrine of standing, it is true, involve review of administrative agencies. *See, e.g., Data Processing Service* v. *Camp, supra; Barlow* v. *Collins, supra; Sierra Club* v. *Morton,* 405 U.S. 727 (1972). However, the doctrine is by no means limited to such situations. The question of standing arises in determining who is a proper plaintiff to adjudicate the constitutionality of statutes and ordinances. *See Flast* v. *Cohen,* 392 U.S. 83 (1968); *Baker* v. *Carr,* 369 U.S. 186, 204-208 (1962); *City of Chicago* v. *Atchison, Topeka & Santa Fe R. Co.,* 357 U.S. 77 (1958). More relevant to our own case, standing has been recognized as an issue in determining who is a proper plaintiff to assert that a corporation created by the Government is violating its statutory authority. *See Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1 (1968).

A. *The applicable standard.*

Recent Supreme Court cases have announced a three-part test to determine whether a plaintiff has standing to seek judicial review of administrative action. As set forth in *Data Processing, supra,* those tests are: (1) whether the plaintiff has alleged that he suffered injury in fact, economic or otherwise, 397 U.S. at 152; (2) whether the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question, 397 U.S. at 155-156; and (3) whether judicial review has been precluded by the legislature, 397 U.S. at 156. *See also Barlow* v. *Collins, supra,* 397 U.S. at 164-165. It appears from *Data Processing,* a case involving review of administrative action, that this tripartite test represents both a formulation of Article III's "case" or "controversy" requirement [2] and an interpretation of the Administrative Procedure Act (APA),

[2] The Supreme Court's most recent cryptic pronouncement on standing seems to indicate that the standing test may be

5 U.S.C. §§ 701(a)(1) and 702 (1970). *See Data Processing Service* v. *Camp, supra,* 397 U.S. at 153, 156. *See also Barlow* v. *Collins, supra,* 397 U.S. at 169-170, 173-175 (Mr. Justice Brennan, concurring in the result and dissenting). The question arises, then, whether the same tripartite test should govern standing to sue a corporation that is neither an agency of the federal government nor subject to the APA.

Public policy favors adopting a standing test as liberal as that which has arisen in the administrative law context to determine whether a given plaintiff can sue a congressionally created corporation to enjoin it from violating its enabling statute. A significant aspect of recent standing decisions is a recognition that judicial review is necessary to ensure the integrity of federal regulatory programs, an integrity that is violated as much when a corporation created by the Government violates its enabling act as when a Government agency violates the law. *See Ballerina Pen Co.* v. *Kunzig,* 140 U.S.App.D.C. 98, 102 n.8, 433 F.2d 1204, 1208 n.8 (1970), *cert. dismissed,* 401 U.S. 950 (1971). What we said there with respect to administrative agencies is also pertinent to judicial overview of the actions of Government-created corporations:

> "* * * Logic tells us that Congress lays down the statutory framework within which the various agencies it establishes are to operate with very definite goals in mind—the agencies are designed to function according to the will of Congress; they are not given life, breadth and scope of their own to function as they see fit; rather, they must function as Congress intended them to function. * * *"

140 U.S.App.D.C. at 101-102, 433 F.2d at 1207-1208.

It is also important to note that, while the Amtrak Act states that Amtrak is not a Government agency, the cor-

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based solely on the APA. *See Sierra Club* v. *Morton,* 405 U.S. 727, 732 n.3 (1972). *See also* note 10 *infra.*

poration has several features making it, in the words of the Secretary of Transportation, "quasi-public."[3] For example, a majority of the corporation's board of directors is appointed by the President. 45 U.S.C. § 543(a). The corporation received its initial financing from the United States Treasury, *see* 45 U.S.C. § 601, and continued financing is facilitated through Government guarantees on corporate obligations, *see* 45 U.S.C. § 602. Amtrak's books and records are to be audited by the Comptroller General of the United States, *see* 45 U.S.C. § 644(2)(A), and the results of audits are to be made available to the Congress, *see* 45 U.S.C. § 644(2)(B). Because of Amtrak's quasi-public character, and the consequential public interest in ensuring that its actions conform to its legislative mandate, we conclude that the liberal tripartite standing test developed by the Supreme Court in the administrative agency context should be used to determine whether appellant has standing to seek judicial review of actions by Amtrak allegedly in violation of its enabling act.

B. *Application of the* Data Processing *standing test to this case.*

The first two tests are easily satisfied. With respect to the injury in fact requirement, the National Association of Railroad Passengers alleged in its complaint that it has a number of members in the affected area of the State of Georgia who would suffer from any discontinuance of the Nancy Hanks. *Compare Sierra Club* v. *Morton, supra.* The interest sought to be protected by the Association is clearly within the zone of interests to be protected by the Amtrak Act. That railroad passengers were the intended benefici-

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[3] Supplemental Hearings on H.R. 17849 & S. 3706 Before Subcommittee on Transportation & Aeronautics, House Committee on Interstate & Foreign Commerce, 91st Cong., 2d Sess., at 67-68 (1970) (hereinafter cited as Supplemental Hearings).

aries of the Act is obvious from the congressional findings and declaration of purpose in Section 1 of the Act, 45 U.S.C. § 501:

> "The Congress finds that modern, efficient, intercity railroad passenger service is a necessary part of a balanced transportation system; that the public convenience and necessity require the continuance and improvement of such service to provide fast and comfortable transportation between crowded urban areas and in other areas of the country; * * * that the traveler in America should to the maximum extent feasible have freedom to choose the mode of travel most convenient to his needs * * *. * * *"

The only complicated issue in this case is the third part of the *Data Processing* test, namely, whether Congress intended to preclude standing for this plaintiff. It is important to emphasize that we do not begin our analysis of this issue from a neutral posture, but rather from a strong presumption in favor of judicial review. Where there is no express denial of judicial review, the issue is whether "nonreviewability can fairly be inferred," *Barlow* v. *Collins, supra,* 397 U.S. at 166, and, as Mr. Justice Douglas emphasized, preclusion of judicial review "is not lightly to be inferred." *Ibid.* Judicial review "is the rule, and nonreviewability an exception which must be demonstrated." *Ibid.* It is "'only upon a showing of "clear and convincing evidence" of a contrary legislative intent' that the courts should restrict access to judicial review." *Id.* at 167, *quoting Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 141 (1967). It is with this strong presumption in mind that we now turn to analyze whether we can infer congressional intent to preclude judicial review from either (1) the language of the Act itself, (2) the legislative history, or (3) the Act's purpose.

1. *Implications to be drawn from the statute itself.*

Section 307 of the Amtrak Act, 45 U.S.C. § 547, provides:

"(a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilites under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

"(b) Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this chapter."

Appellees contend that under the well established maxim of statutory construction *expressio unius est exclusio alterius* the statute's express provision of standing for the Attorney General, employees and employee representatives must be read as an implied exclusion of standing for other parties. We think too much is made of the maxim in this case. Whatever superficial appeal the maxim may have, courts have often noted that it must be applied with a certain degree of caution. It is only an aid to statutory construction, not a rigid rule of law. *Neuberger* v. *C.I.R.*, 311 U.S. 83, 88 (1940); *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, 1 Cir., 312 F.2d 214, 220 (1963), *affirmed*, 377 U.S. 235 (1964); *Renken* v. *Harvey Aluminum (Incorporated)*, D. Ore., 226 F.Supp. 169, 175 (1963). The Supreme Court has recognized that rules of statutory construction such as this

"come down to us from sources that were hostile to-

> ward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."

S.E.C. v. *Joiner Corp.*, 320 U.S. 344, 350-351 (1943) (footnotes omitted). *See also Springer* v. *Philippine Islands*, 277 U.S. 189, 207 (1928); *F.T.C.* v. *Standard Motor Products, Inc.*, 2 Cir., 371 F.2d 613, 617-618 (1967); *Hunt Foods & Industries, Inc.* v. *F.T.C.*, 9 Cir., 286 F.2d 803, 807 (1960), *cert. denied*, 365 U.S. 877 (1961); *Matheson* v. *Armbrust*, 9 Cir., 284 F.2d 670, 674 (1960), *cert. denied*, 365 U.S. 810 (1961). Another court has noted:

> "• • • The doctrine *expressio unius est exclusio alterius* is at best an unreliable basis for ascertaining intention. Its premise is that the draftsman has made a comprehensive review of all possible related provisions, from which the inference is to be drawn that his silence indicates a discriminating judgment of rejection. Such a conclusion usually is unrealistic, for it assumes too much foresight in the draftsman. • • •".

Durnin v. *Allentown Federal Savings & Loan Assn*, E.D. Pa., 218 F.Supp. 716, 719 (1963). *See also* Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 290-291 (1963).

It seems reasonable to us that the express provision of standing for the Attorney General was not an attempt to *bar* other injured and aggrieved parties from bringing suit, but rather an attempt to *authorize* the Attorney General to bring suit to enforce what otherwise might be viewed as private rights. *See Wood* v. *National Railroad Passenger Corp.*, D. Conn., 341 F.Supp 908, 912 (1972). *Cf. Allen* v.

State Board of Elections, 393 U.S. 544, 555 n.18 (1969). The very brief explanation of Section 307 in the section-by-section analysis of the House Report comports with this view. "Section 307 authorizes the Attorney General of the United States to sue the corporation or any railroad to prevent acts of omission or commission in violation of this legislation." H.R. Rep. No. 91-1580, 91st Cong., 2d Sess., at 9 (1970).

That Congress intended to authorize suits by the Attorney General, and not to bar suits by other parties, is also evident in the scope of authority granted to the Attorney General. He is not simply given power to seek injunctions against violations of the Act, but is authorized to bring suit against Amtrak or any railroad for any actions that obstruct, interfere with, or are inconsistent with the policies of the Act. He is not only authorized to remedy ongoing violations, but any threatened violation, interference, refusal, failure or neglect. By singling out the Attorney General, Congress did not attempt to provide the sole means for litigating violations of the Act, but merely emphasized, even to the point of redundancy, that the Attorney General had broad powers to seek equitable relief under the Act. It was quite understandable for Congress to want to make this clear. The proposal to set up a quasi-public corporation to operate the railroads was, in the words of Senator Prouty, the proposal's draftsman, "a departure from the traditional ways of assisting vital segments of our national transportation system."[4] It was, in the words of other members of Congress, "novel," "ingenious," "imaginative," and "innovative."[5] Given the novelty of the proposal, Congress undoubtedly felt that it could neither foresee nor spell out all the kinds of actions by Amtrak or the railroads that might be inconsistent with the Act's policies. Congress

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[4] S. Rep. No. 91-765, 91st Cong., 2d Sess., at 77 (1970).

[5] 116 CONG. REC. (Part 27) 36597, 36598, 36895 (1970).

therefore want to make it clear that the judiciary, at the behest of the Attorney General, had power to read between the lines of the statute and to enjoin actions or threatened actions which, though not necessarily violations of any express provision of the Act, interfered with the Act's purpose of revitalizing intercity rail passenger service. There is no reason to read into this congressional emphasis an implied purpose to bar other parties from litigating ongoing violations of express provisions of the Amtrak Act.

We might also note that were we to adopt appellees' interpretation of the statute Amtrak and the railroads would be unable to sue each other for violation of their mutual obligations under the Act. For example, should a railroad ignore its obligation to compensate Amtrak under Section 401(a)(2) of the Act, 45 U.S.C. § 561(a)(2), Amtrak would be unable to go into court and sue for the money owed since such a suit would be for a failure to discharge a responsibility under the Act and thus within the scope of Section 307. It is hard to believe that, having given Amtrak a broad mandate to revitalize the nation's intercity rail service, the Congress would have hampered it in this fashion. Amtrak is by statute a for-profit corporation, *see* 45 U.S.C. § 541, and we presume Congress intended it to have those powers vital to a profit-making enterprise, including the power to bring suit against those with whom it contracts. We hesitate to interpret Section 307 in a manner which would deny it that power.

Turning to the reference in Section 307 to suits by employees and their representatives, appellees argue that to allow any injured and aggrieved party to sue for violations of the Act would turn this provision into mere surplusage and that such an interpretation should be avoided. *See, e.g., McDonald* v. *Thompson*, 305 U.S. 263, 266 (1938); *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932). We reject this reasoning on two grounds. First, like the Attorney General, employees and their representatives are

not only empowered to litigate actual violations of the Act; they can bring suit against any actual or threatened "action, practice, or policy inconsistent with the policies and purposes" of the Act. To permit other parties to seek injunctions against actual violations of express provisions of the Act does not turn this language into surplusage, for labor's authority to sue is much broader. Second, it is reasonable to assume that Congress wanted to take special precautions to make it clear that employees and their representatives had standing under the Act. Because the primary purpose of the Act was to improve intercity rail passenger service for the benefit of passengers, Congress might well have feared that under the *Data Processing* standing test employees and their representatives would not have been considered members of the class intended to be protected by the legislation, at least not in all cases in which their interests were affected. *See Data Processing Service* v. *Camp, supra,* 397 U.S. at 154-156; *Barlow* v. *Collins, supra,* 397 U.S. at 164-165. That Congress merely intended to emphasize the rights of labor is evident from other provisions of the Act. For example, Section 405(a), 45 U.S.C. § 565(a), requires railroads to make "fair and equitable arrangements to protect the interests of employees affected by discontinuances of intercity rail passenger service • • •" and other subsections define the substantive content of such arrangements. Despite the clarity of this requirement, Section 401 (a) of the Act, 45 U.S.C. § 561(a), again emphasizes that a valid contract under the Act must include protective arrangements for employees. We are therefore confident that, by singling out employees and their representatives in Section 307, Congress was not attempting to prevent other parties from bringing suit, but was simply making it abundantly clear that labor's interests would be protected as well.

Since we can explain the express provision of standing in the Attorney General, employees and employee repre-

sentatives on grounds unrelated to any congressional intent to preclude other injured and aggrieved parties from bringing suit, we cannot reasonably infer from the statutory language an intent to bar other parties from bringing suit, especially in light of the strong presumption in favor of review with which we began our analysis.

2. *Implications to be drawn from the legislative history.*

As originally drafted, Section 307 provided jurisdiction "upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any individual affected thereby * * *." S. 3706, 91st Cong., 2d Sess., § 307(a) (May 7, 1970), reprinted in Supplemental Hearings, *supra* note 3, at 44. The National Legislative Director of the United Transportation Union presented the Subcommittee with an amendment that would have deleted the phrase "in a case involving a labor agreement, upon petition of any individual affected thereby" and would have substituted the phrase "of any person adversely affected or aggrieved thereby, including the representatives of the employees of any railroad or of the Corporation."[6] He claimed that the amendment was designed "[t]o provide a legal remedy to any aggrieved person including the duly authorized representatives of the employees of the railroads and of the Corporation for any violations of the Act by the Corporation or by any railroad."[7] Following this testimony, the General Counsel of the Railway Labor Executives Association appeared before the Subcommittee and introduced a similar amendment. He stated:

> "The third substantive amendment we propose would modify the language of section 307(a) on pages 14 and 15 of the bill so as to provide that any aggrieved party, including employee representatives, could institute legal proceedings for violations of the law.

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[6] Supplemental Hearings, *supra* note 3, at 122.

[7] *Ibid.*

> "As the bill now reads, only the Attorney General, except in cases involving a labor agreement, could bring such actions . . . ."[8]

Later, Secretary of Transportation Volpe offered some comments on the proposed amendments. His letter to the Committee stated:

> "Labor proposes that subsection (a) of section 307 be amended to make sanctions available not only against the Corporation but against all railroads. It also proposes that any person adversely affected or grieved [*sic*], including employee representatives, be permitted to seek relief.
>
> "Sanctions are normally imposed by the Government. Consequently, I would be opposed to permitting 'any person' to seek enforcement of section 307. I would have no objection, however, if the section were revised to permit employee representatives, as well as employees adversely affected, to seek equitable relief."[9]

As is evident from the language of Section 307 as enacted, the Committee never adopted the proposed amendment. Rather it changed the phrase "in a case involving a labor agreement, upon petition of any individual aggrieved thereby" to read "in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives."

Appellees suggest that the Committee's refusal to adopt the proposed amendment indicates Congress' intent not to allow any person aggrieved to have standing to sue. While the argument has a superficial appeal, we are constrained to reject its implications. Interpretation of statutes cannot safely rest upon changes made in congressional committee without explanation. *Trailmobile Co.* v. *Whirls*, 331 U.S.

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[8] *Id.* at 134.

[9] *Id.* at 85.

40 (1947). Courts should avoid delving into "legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc.* v. *Walling,* 324 U.S. 244, 260 (1945). Especially is this true when a court is asked to draw inferences from congressional failure to adopt proposed amendments to legislation. "Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment • • • including the inference that the existing legislation already incorporated the offered change." *United States* v. *Wise,* 370 U.S. 405, 411 (1962).

In the instant case we are unable to draw inferences from the legislative history with any confidence. The proposed amendment was never debated or criticized by members of Congress so that failure to adopt the amendment might reasonably be construed to be congressional rejection of that which the amendment provided for. *Compare National Automatic Laundry & Cleaning Council* v. *Shultz,* 143 U.S. App.D.C. 274, 291, 443 F.2d 689, 706 (1971). The Committee might well have believed, notwithstanding the remarks of railway labor representatives, that Section 307 as originally drafted did not bar suits by all injured and aggrieved parties.[10] Indeed, the only mention of the scope

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[10] It is also conceivable that the Committee rejected labor's proposed amendment because it may have constituted an unconstitutional expansion of federal jurisdiction. As quoted in text, the amendment would have permitted any person "adversely affected *or* aggrieved" to bring suit. (Emphasis added.) Since the provision was worded in the alternative, it may reasonably have been read to allow persons who are aggrieved but not injured to bring suit. The Supreme Court had indicated, prior to passage of the Amtrak Act, that the "case" or "controversy" requirement of Article III required that the plaintiff himself be injured in fact. *See, e.g., Data Processing Service* v. *Camp,* 397 U.S. 150, 152 (1970). There

of Section 307 during debate on the floor of Congress suggests that Congress interpreted the section to permit such suits. When the Senate considered the Amtrak Act, it had before it both the proposal by Senators Hartke and Prouty (the one eventually enacted into law) and a competing proposal put forth by Senators Pell and Kennedy. In support of his proposal, Senator Kennedy introduced into the Congressional Record a chart summarizing the basic differences between the two proposals. Looking at the item on the chart called "Sanctions," we find this simple notation to describe both proposals: "In Federal District Court by affected parties for violations of Act." 116 CONG. REC. (Part 11) 14275 (1970). At least one member of Congress, therefore, thought the Act, as reported from committee, did allow suits by "affected parties." And there is no indication that any member of Congress thought otherwise.

Nor do we find it significant that labor representatives testifying at the comittee hearings said that the Act, as originally drafted, barred all parties other than the Attorney General and employees from bringing suit. The

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was substantial scholarly debate as to whether the Court's standing tests were in fact constitutionally required. *See, e.g.*, Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L. J. 816 (1969).

If injury in fact was required by Article III's case or controversy requirement, then settled principles of law, dating back to *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), indicated that Congress had no power to expand the jurisdiction of federal courts beyond the scope of Article III to cases in which the plaintiff was not injured in fact. Congress might well have believed, therefore, that the proposed amendment was unconstitutional.

It was not until after enactment of the Amtrak Act that the Supreme Court, in a footnote seemingly inconsistent with recent pronouncements such as *Data Processing*, said that "where a dispute is otherwise justiciable" the question of

individual opinions of witnesses at hearings are of dubious value in interpretation of legislation. *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493 (1931); *Pacific Ins. Co.* v. *United States*, 9 Cir., 188 F.2d 571, 572, *cert dismissed*, 342 U.S. 857 (1951); *United States* v. *Kung Chen Fur Corp.*, Ct. Cus. & Pat. App., 188 F.2d 577, 584 (1951); *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 80 U.S.App.D.C. 119, 122, 149 F.2d 507, 510 (1945), *affirmed*, 326 U.S. 446 (1946).

Finally, the Act itself indicates that where Congress intended to preclude judicial review it knew very well how to make its wishes clear. Section 201, 45 U.S.C. § 521, provides that the Secretary of Transportation is to designate a "basic system" of points between which intercity passenger trains shall be operated, and Section 401(b) of the Act, 45 U.S.C. § 561(b), requires Amtrak to operate trains within the basic system unless such trains are being operated by carriers not contracting with Amtrak or by regional transportation agencies. Section 202 of the Act, 45 U.S.C. § 522, expressly provides with respect to review of the Secretary's determination of the basic system: "The basic system as designated by the Secretary shall become effective for the purposes of this chapter upon the date that the final report of the Secretary is submitted to Congress *and shall not be reviewable in any court.*" (Emphasis added.) Congress could just as easily have made clear its desire to limit the right to seek review to the Attorney General and labor by placing the word "only" before the phrase "upon petition of the Attorney General • • •" in the statute. *Compare Wood* v. *National Railroad Passenger Corp.*, *supra*, 341 F.Supp. at 911, *with Congress of Railway Unions* v. *Hodgson*, D. D.C., 326 F.Supp. 68, 78

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standing "is one within the power of Congress to determine." *Sierra Club* v. *Morton*, *supra* note 2, 405 U.S. at 732 n.3.

(1971). That it failed to do so indicates to us that it had no intent to bar other parties from seeking judicial review.

3. *Implications to be drawn from the purposes of the Amtrak Act.*

A command of a statute to preclude judicial review may sometimes be inferred from its purpose. *Barlow* v. *Collins, supra,* 397 U.S. at 167. *See also Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297 (1943). It is argued that to allow all injured and aggrieved parties to sue for violations of the Amtrak Act will subject the railroads and Amtrak to crippling litigation, involving massive expenses and distractions, which may well prevent them from devoting adequate time, money and attention to the task for which Congress brought Amtrak into being, namely, saving the country's intercity rail passenger service.

Although such arguments as these normally carry little weight, they merit some discussion here. The legislative history makes it quite clear that one of Congress' purposes in enacting the Amtrak Act was to enable railroads to discontinue uneconomical trains that were draining their resources. The House Report recognized:

> "In order to achieve economic viability in a basic rail passenger system, the Secretary [of Transportation] stated that there will have to be a 'paring of uneconomic routes'. • • •
>
> "In other words, a rational reduction of present service will be required to save *any* passenger service. • • •" [11]

The legislative history also indicates that one of the faults of the system prior to passage of the Amtrak Act was that uneconomical trains could not be discontinued until after lengthy administrative hearings before the ICC and appeals before three-judge District Courts from ICC rul-

[11] H.R. Rep. No. 91-1580, 91st Cong., 2d Sess., at 3 (1970). (Emphasis in original.)

ings.[12] The Amtrak Act dealt with this problem by providing that railroads entering into a contract could immediately terminate all of their intercity rail passenger service. *See* 45 U.S.C. § 561(a)(1).

But we are unable to conclude from this legislative purpose that Congress intended to deny standing to injured and aggrieved passengers. It must not be forgotten that the chief purpose of the Amtrak Act was to save the passenger train from extinction. "The basic purpose of this bill is to prevent the complete abandonment of intercity rail passenger service * * *." H.R. Rep. No. 91-1580, *supra*, at 1. Congress intended to ensure survival of the passenger train by enacting an elaborate regulatory system which would encourage railroads to turn over all their intercity passenger service to Amtrak. It was hoped that Amtrak would then "revitalize rail passenger service in the expectation that the rendering of such service along certain corridors can be made a profitable commercial undertaking, particularly with new equipment or advanced vehicles." *Id.* at 1-2.

Achievement of Congress' objectives plainly requires compliance with the provisions of the Amtrak Act, and judicial review of Amtrak's actions is necessary if compli-

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[12] Hearings on H.R. 12084 etc., Before Subcomittee on Transportation & Aeronautics, House Committee on Interstate & Foreign Commerce, 91st Cong., 1st Sess., at 307 (1969). *See, e.g., Chicago & Eastern Ill. R. Co. Discontinuance of Trains*, 331 I.C.C. 447 (1968), *appeal dismissed, sub nom. City of Chicago* v. *United States*, N.D. Ill., 294 F.Supp. 1103, *reversed & remanded to District Court*, 396 U.S. 162 (1969), *vacated & remanded to ICC*, N.D. Ill., 312 F.Supp. 442, *reversed & remanded to District Court*, 400 U.S. 8 (1970); *Chicago & Eastern Ill. R. Co. Discontinuance of Trains*, 333 I.C.C. 626 (1968), *reversed & remanded*, N.D. Ill., 308 F.Supp. 645 (1969), *prob. jurisdiction noted*, 398 U.S. 957 (1970), *judgment vacated & case remanded to District Court with directions to remand to ICC*, 400 U.S. 987 (1971).

ance is to be assured. Allowing parties other than the Attorney General and labor to contest violations of the Act is not only fully consistent with, but is also necessary to achieve, this objective.[13] As the Supreme Court noted on another occasion when it was confronted with a statute that provided for review at the behest of the Attorney General without expressly providing for or barring review by other parties:

> "The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. * * * The Attorney General has a limited staff and often might be unable to uncover quickly [violations of the Act]. * * *"

The guarantees of the legislation

> "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement * * *."

Allen v. *State Board of Elections, supra,* 393 U.S. at 556-

[13] It is important to note that, even though allowing suits by parties other than the Attorney General and employees will doubtless result in increased litigation, such litigation will not burden the railroads as much as litigation under pre-Amtrak procedure. The major problem with pre-Amtrak procedure was not the presence of litigation, but the fact that litigation involved, in the case of the ICC, determining the nebulous question of whether the service "is required by public convenience and necessity and will not unduly burden interstate or foreign commerce * * *." 49 U.S.C. § 13a(1) (1970). Resolution of this issue required numerous public hearings at various sites along a given train's route and analysis of complex corporate financial records. It is doubtful that issues arising under the Amtrak Act will involve resolution of such difficult factual issues or will entail the same amount of time such fact-finding consumes. For example, in the present case the facts are undisputed and the sole question is the legal issue of whether the Act permits Amtrak to contract with a subsidiary without contracting with its parent.

557. (Footnotes omitted.) The Attorney General's action in the case which is a companion on appeal to the instant case supports the Court's observations. After the District Court's decision to deny review for lack of standing, a member of Congress sent a letter to the Attorney General asking that he enter the litigation to remove procedural obstacles to adjudication on the merits. In refusing to do so, the Attorney General expressed the belief that he had no power under the Amtrak Act "to sue for a construction of the Act or to enjoin a purely technical violation." He maintained that his only authority was to bring suits "to protect and enhance the legislative purpose."[14] Indeed, appellees in this case have been unable to refer us to a single instance in which the Attorney General has either institgated or participated in litigation under the Amtrak Act, except for a few cases brought by other parties in which he intervened solely to support the defense that parties other than labor and the Attorney General did not have standing to sue. *Cf. Allen v. State Board of Elections, supra,* 393 U.S. at 556 n.22. To rely on the Attorney General as the sole source of litigation under the Act, as he would be in cases where labor's interests were not adversely affected, is thus to rest enforcement of the entire regulatory scheme on the Attorney General's virtually unreviewable[15] distinction between a mere "technical" violation and one that seriously interferes with the legislative purpose.

Absent some express and definite indication that it intended such a result, we find it difficult to believe that Congress would have hung a program as important as this by

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[14] Letter from Assistant Attorney General L. Patrick Gray, III to Congressman John Slack, Nov. 19, 1971, in appellant's Reply to Supplemental Memorandum.

[15] *See Powell* v. *Katzenbach,* 123 U.S.App.D.C. 250, 359 F.2d 234 (1965), *cert. denied,* 384 U.S. 906 (1966).

such a thin thread. We think such a result is neither compelled by the language of the statute, reasonably to be implied from the legislative history, nor conducive to achievement of the Act's laudable purpose of revitalizing the nation's intercity rail passenger trains. We therefore hold that parties other than the Attorney General, employees and employee representatives who are injured and aggrieved by actions of Amtrak or railroads in violation of the Amtrak Act have standing under that Act to seek injunctions against such actions in federal court.

III

Amtrak suggests that the real issue in this case is not standing, but rather the jurisdiction of the District Court. Focusing on the jurisdictional nature of Section 307, Amtrak argues that by expressly giving the District Court jurisdiction in cases brought by the Attorney General, employees or their representatives Congress intended to deprive the District Court of jurisdiction over suits brought by all other parties. But even were we to accept Amtrak's characterization of the issue presented, we would be unable to agree with its conclusion.

Jurisdiction of the District Court need not rest on Section 307. Appellant's complaint alleged jurisdiction on the basis of 28 U.S.C. § 1337 (1970) which provides: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." Appellees' answer to Section 1337 jurisdiction is the Supreme Court's decision in *Switchmen's Union* v. *National Mediation Board, supra.* In that case the Supreme Court held that the general grant of jurisdiction in Section 1337 could not be invoked to sustain jurisdiction to review decisions of the National Mediation Board certifying a representative for collective bargaining, even though such a case admittedly seemed to

meet the requirements of Section 1337. *Switchmen's Union* is cited in the Court's opinion in *Barlow* v. *Collins, supra,* as authority for the proposition that "[a] clear command of the statute will preclude [judicial] review; and such a command of the statute may be inferred from its purpose." 397 U.S. at 167.

We think *Switchmen's Union* is obviously distinguishable from our case on several significant grounds. First, the Court admitted in that case that "[i]f the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." 320 U.S. at 300. It found that the right of collective bargaining involved in that case was being protected without judicial review since the Mediation Board was determining the appropriate craft or class in which an election should be held. In other words, in that case the Mediation Board was already acting as a neutral body resolving disputes between labor and management or between competing labor groups. In sharp contrast, in our case no neutral administrative body had resolved a dispute between the antagonists—Amtrak and the railroads on the one hand and railroad passengers on the other. Amtrak has simply made a determination about the meaning of its own enabling statute. In this situation we are unable to conclude, as the Supreme Court concluded in *Switchmen's Union,* that there is considerable question as to whether judicial review would strengthen the rights protected by the legislation. *Id.* at 301.

It is also important to note that the finding of a command of the statute to preclude judicial review in *Switchmen's Union* was based on the entire history of Congress' treatment of railway labor problems. As the Court emphasized, Congress intentionally left large areas of the field

"in the realm of conciliation, mediation, and arbitration." *Id.* at 302. To create a new judicially enforceable right in this kind of situation would have been contrary to this long history. In our case, on the other hand, the history of railroad discontinuances indicates that until now administrative and judicial remedies were available at the behest of passengers. As is discussed more fully in our opinion in No. 71-1321, *infra*, prior to passage of the Amtrak Act railroads had to seek approval of their train discontinuances before either the state regulatory commissions or the ICC. Passenger groups and other affected parties were allowed to intervene and argue their cases in these forums.[16] We cannot help but believe that if Congress had wanted to take away these rights it would have done so in a more explicit fashion. Thus for the same reasons that we found no congressional intent in Section 307 to overcome the strong presumption of standing in favor of persons intended to be protected by legislation, we now find no congressional intent to overcome the general jurisdictional grant in Section 1337.

Appellees' final challenge to Section 1337 jurisdiction is to note that Section 1337 merely permits jurisdiction; it does not create a cause of action. *See Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951). The question then becomes, can a private right of action be implied under the Amtrak Act? We think there is ample precedent for implying such a private cause of action. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood, supra*, 327 U.S. at 684. When Congress seeks to protect a group such as railroad passengers, we may reasonably imply, absent express and definite indications to the contrary, that Congress intended

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[16] *See* 49 C.F.R. § 1122.4(d) (Oct. 1, 1972).

this group to have judicial relief to achieve the protection Congress intended. *See J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431-432 (1964). It is argued that the principle should not apply because railroad passengers are merely indirect beneficiaries of the Amtrak Act. We most heartily disagree. As indicated earlier, the congressional statement of purpose makes clear that the main function of the Amtrak Act was to preserve and improve train service. The object of the legislation was not just trains, but the people who ride them.

The private civil action, involving injured individuals acting as private Attorneys General, is becoming an accepted method of policy enforcement. *See Gomez* v. *Florida State Employment Service*, 5 Cir., 417 F.2d 569 (1969). *See also* Note, *Implying Civil Remedies From Federal Regulatory Statutes, supra.* Not only is it an accepted method, but it is one that the courts have an interest in encouraging. The judicial process works best when those with "a direct stake in the outcome" participate. *Sierra Club* v. *Morton, supra*, 405 U.S. at 740. It is important that cases be brought by those with "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues • • •." *Baker* v. *Carr, supra*, 369 U.S. at 204. Courts have supported these policies by recognizing private rights of action in a wide variety of situations and refusing to recognize those actions only in those cases where such was the express intent of Congress, *see, e.g., Powell* v. *Washington Post Co.*, 105 U.S.App.D.C. 374, 267 F.2d 651, *cert. denied*, 360 U.S. 930 (1959), or where private actions are inconsistent with other important policies such as exhaustion of administrative remedies, *see, e.g., Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra; B. F. Goodrich Co.* v. *Northwest Industries, Inc.*, 3 Cir., 424 F.2d 1349, *cert. denied*, 400 U.S. 822 (1970). Neither of these factors is present in the case of the Amtrak Act. We there-

fore conclude that a complaint alleging a violation of the Amtrak Act states a cause of action arising under an Act of Congress regulating commerce and thus may be litigated in federal district court under Section 1337.

Reversed and remanded.

No. 72-1321

On April 1, 1971, appellee Baltimore & Ohio Railroad Company (B & O) filed a notice with the ICC stating that it would discontinue six of its trains effective May 1, 1971. Four of the trains operate between the District of Columbia and Cumberland, Maryland. The other two operate between the District and Baltimore. The notice was filed pursuant to Section 401(a)(1) of the Amtrak Act, 45 U.S.C. § 561(a)(1). That section provides that a railroad which has entered into a contract with Amtrak "shall be relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service • • •" provided that the railroad give notice of the discontinuance. Appellant Potomac Passengers Association, a group of rail commuters in the Washington, D.C. area, brought this action to obtain a declaration that the trains provided "commuter" rather than "intercity" service and are thus exempt from discontinuance under the Amtrak Act. In addition, appellant sought an injunction against the discontinuances on the ground that they violated the Amtrak Act. The District Court, accepting without comment appellant's characterization of the lawsuit as one for a violation of the Amtrak Act, held that appellant did not have standing to sue under Section 307 of the Act and dismissed the complaint. *See Congress of Railway Unions* v. *Hodgson, supra,* 326 F.Supp. at 79-80.

Were we to accept this characterization of the lawsuit, the case would present the same issue as that in No. 72-1546, *supra,* and we would reverse and remand for a hear-

ing on the merits for the same reasons as control that case. It now appears, however, that this characterization is improper. While this lawsuit admittedly seeks a judicial interpretation of a provision of the Amtrak Act, it cannot properly be characterized as a suit for a violation of the Amtrak Act, and it is therefore not controlled by the standing requirement of Section 307. Instead this suit, properly understood, seeks a declaratory judgment that the trains discontinued by B & O provide "commuter" service and are therefore outside the coverage of the Amtrak Act—that is, that their discontinuance is neither authorized nor barred by the Act but is subject to the pre-existing jurisdiction of state regulatory agencies and the ICC. We hold that the District Court has jurisdiction to hear the merits of this declaratory judgment action and therefore reverse and remand.

To understand the posture of this case, it is helpful to summarize briefly the history of the law governing passenger train discontinuances. Prior to 1958 discontinuances of all passenger trains, without distinction as to whether they provided intercity or commuter service, required the approval of the appropriate regulatory agency in each of the states in which the train operated. *See United States* v. *City of Chicago*, 400 U.S. 8, 11 n.3 (1970). This procedure had many faults which Congress attempted to cure by enacting Section 13a of the Interstate Commerce Act, 49 U.S.C. § 13a. This section gave the ICC the power to approve train discontinuances, again without distinction as to the kind of service—intercity or commuter—provided. The ICC's jurisdiction was not exclusive, however. If a railroad so desired, it could continue to seek authorization for a discontinuance from the appropriate state regulatory agencies. At its option, or after the state commission refused to approve the discontinuance, a railroad seeking to discontinue an interstate train could bypass the state regulatory agencies by filing a notice of proposed discon-

tinuance with the ICC. Unless ordered by the Commission to continue the service in question, the railroad could, 30 days after filing its notice, discontinue the service notwithstanding the laws or constitution of any state or the decision or order of, or pendency of any proceeding before, any court or state authority to the contrary. That is, the jurisdiction of the state agencies was exclusive until a notice of discontinuance was filed with the ICC.[17] Once such a notice was filed, the ICC had exclusive jurisdiction.[18]

The Amtrak Act in no way affected this procedure as it applies to passenger trains providing commuter service. The Act applies solely to "intercity rail passenger service," defined in the Act as "all rail passenger service other than (A) commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations * * *." 45 U.S.C. § 502 (5). Without going into the more complicated aspects of the Act, it basically permits railroads that have signed contracts with Amtrak to discontinue their intercity rail passenger service, and it bars railroads that have not

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[17] *See generally Kennedy* v. *Baltimore & Ohio R. Co.*, 342 I.C.C. 19, 21 (1972): "It is well settled that section 13a(1) is a permissive section of the act and does not impose any requirement upon a carrier to file a notice of proposed discontinuance. The first sentence of the statute states that a carrier '*may*, but *shall not be required to*, file with the Commission * * *.' [Emphasis supplied.] If a carrier does not choose to file with the Commission, jurisdiction is retained by the States."

[18] *See Pennsylvania R. Co.* v. *Sharfsin*, M.D. Pa., 240 F. Supp. 233, 235, *vacated & remanded on other grounds, sub nom. Pennsylvania Public Utility Comm'n* v. *Pennsylvania R. Co.*, 382 U.S. 281 (1965), *affirmed*, 3 Cir., 369 F.2d 276 (1966), *cert. denied*, 386 U.S. 982 (1967); *Chicago & Eastern Ill. R. Co.* v. *United States*, *supra* note 12, 308 F.Supp. at 648.

signed contracts with Amtrak from discontinuing such service prior to 1975. All references in the Act are to *intercity* rail passenger service;[19] the Act neither authorizes nor bars discontinuance of trains providing commuter and other short-haul service. It simply has no effect on such trains. This is evident not only from the language of the Act but also from the legislative history.[20] Therefore, a railroad desiring to discontinue a train providing commuter and other short-haul service must seek approval from either the regulatory agencies of the states through which the train passes or from the ICC, just as it did prior to passage of the Amtrak Act.[21]

B & O has not sought such approval in this instance because it believes that the trains it discontinued provide in-

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[19] A prior version of the bill referred in one section simply to "passenger service." The mistake was quickly brought to the attention of the Committee and the words "intercity rail" inserted before "passenger service" "to avoid the application of this section to commuter service." Supplemental Hearings, *supra* note 3, at 110.

[20] "The bill will apply only to intercity passenger trains and would not apply to service which is primarily commuter service." 116 CONG REC. (Part 11) 14164 (1970). "[T]his legislation * * * refers to intercity transportation of passengers by rail. It does not include commuter service. Of relevance here is the fact that the Senate has approved a bill specifically allocating $3 billion for commuter and other urban transportation. * * * Basically, commuter service is excluded from the bill * * *." *Id.* at 14178. *See also* note 19 *supra.*

[21] The ICC has recognized its continued jurisdiction over commuter trains if a railroad invokes that jurisdiction by filing a notice of discontinuance with the Commision. *See Chicago S. Shore & S. Bend R. Restructuring of Pass. Serv.*, 342 I.C.C. 154, 179-180 (1972). *See also Penn Central Transp. Co. Discontin. or Change in Serv.*, 338 I.C.C. 318, 320 (1971). *Cf. Kennedy* v. *Baltimore & Ohio R. Co.*, *supra* note 17, 342 *I.C.C.* at 21.

tercity rail passenger service, not commuter and other short-haul service. It therefore believes that the discontinuances were authorized under the Amtrak Act. Potomac Passengers Association has requested both a declaration that these trains provide "commuter and other short-haul service" and an injunction against the discontinuances. The issue, then, is whether the District Court has jurisdiction and power to grant either remedy.

At the outset, it is evident that Section 307 of the Amtrak Act does not affect the result. That section, by its own terms, applies only to suits seeking equitable relief necessary to prevent or terminate (1) violations of the Act, (2) conduct that is inconsistent with the policies and purposes of the Act or obstructs or interferes with activities authorized by the Act, (3) failures to exercise responsibilities imposed by the Act, and (4) threats of such actions. Discontinuance of a commuter train, however, is not a violation of the Act, is not inconsistent with the policies of the Act, and does not interfere with activities authorized by the Act. The Act has nothing to do with commuter trains. If the trains at issue provide intercity rail passenger service, as B & O contends, there is no question but that their discontinuance is lawful under the Act.[22] If the trains provide commuter and other short-haul service, as appellant alleges, there is no question but that their discontinuance is unlawful—not under the Amtrak Act, but under the laws of the states through which they pass, since approval has admittedly not been sought from either the state regulatory

[22] The complaint also alleged that the discontinuances were illegal because the discontinuance notices were posted prior to the signing of the contract with Amtrak, even though the discontinuances did not go into effect until after the signing of the contract. Appellant has not pursued this issue on appeal. If the issue is pursued further, of course, nothing we say here should be read as a reflection of our views on the merits of that issue.

agencies or the ICC.[23] Section 307, therefore, has nothing to do with this case, as is evident from subsection (b):

> "Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this chapter."

The foregoing discussion also indicates that the District Court has no power to enjoin discontinuance of these trains. If they provide intercity rail passenger service, their discontinuance is concededly lawful. If they provide commuter service, since no notice of discontinuance has yet invoked the jurisdiction of the ICC, their discontinuance is a violation of state, not federal, law.[24] The District Court has no power to issue an injunction enforcing state law in this instance, for to do so would usurp the primary jurisdiction of the state regulatory agencies and would circumvent the procedure established by the state to enforce its own laws.[25] Should B & O seek approval of the

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[23] "The [Public Service] Commission [of the State of Maryland] may require the continuance of any service rendered to the public by any public service company under any franchise, right, or permit, after its expiration date, if any; and no service under a franchise, right or permit shall be discontinued or abandoned without the consent of the Commission, which shall be granted if the Commission finds that the present or future public convenience and necessity permits such discontinuance or abandonment." 7 ANN. CODE OF MD. Art. 78, § 72 (1969).

"No railroad or other public utility shall discontinue any regular passenger train, or other public service facility, or change any regular passenger train schedule or timetable, without first obtaining authority from the [Public Service Commission of the State of West Virginia] so to do * * *." 9 W. VA. CODE ANN. § 24-3-1 (1971).

[24] *See Kennedy* v. *Baltimore & Ohio R. Co., supra* note 17. *See also* note 1 *supra.*

[25] *See, e.g.,* 7 ANN. CODE OF MD. Art. 78, § 99 (1969): "When

discontinuances from the ICC, an injunction would be inconsistent with the ICC's primary jurisdiction.[26]

It is equally clear, however, that the District Court has jurisdiction to render a declaratory judgment as to whether these trains provide intercity rail passenger service or commuter and other short-haul service within the meaning of the statute. That is, the court may decide whether discontinuance of these trains is still subject to the jurisdic-

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the [Public Service] Commission [of the State of Maryland] is of the opinion that any public service company subject to its jurisdiction is violating or is about to violate any of the provisions of this article, it shall cause action to be brought in its name for mandamus or injunction * * *."

[26] Once a notice of discontinuance is filed with the ICC, that agency can exercise administrative discretion and expertise in several ways. First, the ICC has the option of investigating the discontinuance or simply letting the discontinuance take effect. *See City of Chicago* v. *United States, supra* note 12, 396 U.S. at 165. Even if the ICC does enter into an investigation, the decision whether or not to enjoin the discontinuance pending the outcome of the investigation is also within the discretion of the ICC. "Upon the institution of such investigation, the Commission * * * *may* require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective." 49 U.S.C. § 13a(1). (Emphasis added.) Finally, of course, the ICC uses its expertise in deciding whether to approve the discontinuance or whether continued operation of the train "is required by public convenience and necessity and will not unduly burden interstate or foreign commerce * * *." *Ibid.*

Where matters such as these are entrusted by statute to an administrative agency, the doctrine of primary jurisdiction requires that the parties not circumvent the agency by means of a court action. *See Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). *See also Trans-Pacific Airlines* v. *Hawaiian Airlines*, 9 Cir., 174 F.2d 63 (1949).

tion of the state regulatory agencies and the ICC or whether they are exempted from such jurisdiction by the Amtrak Act. The sole issue in this case is interpretation of a federal law regulating the railroads, and the case is therefore one meeting the jurisdictional requirements of 28 U.S.C. § 1337 which grants jurisdiction of civil actions arising under any Act of Congress regulating commerce. The power to construe the Amtrak Act and declare the nature of these trains is subsumed within the power granted by the Declaratory Judgment Act, 28 U.S.C. § 2201 (1970). We therefore reverse and remand the case to the District Court with instructions to adjudicate the merits of the controversy and issue appropriate declaratory relief.[27]

So ordered.

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[27] In its complaint appellant requested that the District Court refer the intercity-commuter issue to the ICC, a procedure that some other courts have used. *See, e.g., Illinois Commerce Comm'n* v. *Chicago & Eastern Ill. R. Co.*, 400 U.S. 987 (1971); *In re Penn Central Transportation Co.*, E.D. Pa., 329 F.Supp. 572 (1971). *See also In re Penn Central Transportation Co.*, 3 Cir., 457 F.2d 381 (1972). The ICC has already decided several such referral cases. *See, e.g., Penn Central Transp. Co. Discontin. or Change in Serv., supra* note 21; *Penn Central Transp. Co.—Status of Pass. Serv.*, 338 I.C.C. 621 (1971); *same*, 338 I.C.C. 660 (1971); *same*, 338 I.C.C. 690 (1971); *Chicago & Eastern Ill. R. Co. Discontinuance of Trains*, 338 I.C.C. 714 (1971). We intimate no views at the present time as to either the propriety of such a referral in the instant case or the validity of the standards developed by the ICC in the above cited cases.

Filed Jan. 5, 1973

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972
Civil Action 842-71

No. 71-1321

POTOMAC PASSENGERS ASSOCIATION, *Appellant*

v.

CHESAPEAKE AND OHIO RAILROAD COMPANY AND BALTIMORE AND OHIO RAILROAD COMPANY

No. 71-1546

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, *Appellant*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY AND NATIONAL RAILROAD PASSENGER CORPORATION

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: Bazelon, Chief Judge, Wright and Wilkey, Circuit Judges.

Judgment

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On considertion of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from in these causes are hereby reversed and these cases are hereby remanded to

the District Court for the reasons set forth in the opinion of this Court filed herein this date.

Per Curiam

Dated: January 5, 1973
Opinion by Circuit Judge Wright

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972

No. 71-1546

Civil Action 831-71

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, *Appellant*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY and NATIONAL RAILROAD PASSENGER CORPORATION

Before: Bazelon, Chief Judge, and Wright and Wilkey, Circuit Judges

Order

On consideration of appellees' motion to extend the stay of the mandate to March 22, 1973, it is

ORDERED by the Court that the motion is granted and the Clerk is directed to stay the issuance of this Court's mandate until March 22, 1973.

The stay granted herein shall be subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

Per Curiam

For the Court:

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 831-71

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, *Plaintiff*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, NATIONAL RAILROAD PASSENGER CORPORATION, *Defendant.*

Order

This case having been heard on motions for a temporary restraining order and a temporary injunction, and it appearing to the Court (1) that the plaintiff does not having standing to maintain this action under Section 307 of the Rail Passenger Act of 1970 (P.L. 91-518), and (2) that in any event plaintiff has not demonstrated a substantial likelihood of success on the merits of its claim, it is therefore

ORDERED, that the motions be and they are hereby denied, and the cause is hereby dismissed.

/s/ JOHN H. PRATT, J.

May 5, 1971

No objection as to form:
/s/ GORDON P. MACDOUGALL
Counsel for Plaintiff

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
ALBANY, NEW YORK 12201

February 21, 1973

James T. Foley
Chief Judge

JFD:ls
77-62-1298

Mr. James F. Dausch
Attorney
Office of Special Litigation Counsel
Civil Division
United States Department of Justice
Washington, D. C. 20530

Re: Schuler, et al v. National Railroad Passenger Corporation, et al — 72-CV-211 (ND NY)

Dear Mr. Dausch:

Receipt is hereby acknowledged of your letter of February 16, 1973, confirming our telephone conversation of February 14, 1973.

In our conversation, I agreed with your suggestion in behalf of all parties in the above action that the best course to follow was to suspend briefing and withhold decision on the issues pending before me in the above action inasmuch as Amtrak intends to petition for certiorari in regard to identical issues decided by the Circuit Court of Appeals, District of Columbia, in the Central of Georgia Railway and National Railroad Passenger Corporation case, decided January 5, 1973.

I assume from your letter, with copies to the other attorneys, that they agree for all parties in the action before me

to the course of action outlined above and this letter approves it accordingly.

Sincerely,

/s/ JAMES T. FOLEY
Chief Judge, U. S. District Court
Northern District of New York

cc: George Miller, Esq.
John C. McTiernan, Esq.
Donald A. Brinkworth, Esq.
James E. Cullum, Esq.
Joseph R. Scully, Clerk

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530

September 6, 1972

(Seal)

Address Reply to the
Division Indicated
and Refer to Initials and Number
EGL:IG:JFD:cjc

William O. Bittman, Esquire
Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

Re: Potomac Passengers Association v. Chesapeake and Ohio Railway Company, et al., C.A.D.C. No. 71-1321; N.A.R.P. v. Central of Georgia Railway Company, et al., C.A.D.C. No. 71-1546.

Dear Mr. Bittman:

You have informed us that the above-named cases will be argued to the United States Court of Appeals for the District of Columbia Circuit on Friday, September 8, 1972. You have also furnished us copies of Appellants' brief, reply brief, and supplemental brief. In the latter document, Appellants represent to the Court that the Attorney General has "allowed private parties to proceed on their own" to seek enforcement of the policies and provisions of the Rail Passenger Service Act of 1970, 45 U.S.C. 501 et seq. (the Act), by means of private suits in the district courts. It appears that Appellants misapprehend the position of the Attorney General. It is our position that, in non-labor agreement cases, Section 307 of the Act, 45 U.S.C. 547, reserves to the Attorney General the exclusive right to sue Amtrak or any railroad for actual or threatened violation of the policies and provisions of the Act. This position coincides with Judge Corcoran's construction of Section

307 of the Act in his opinion below in the consolidated cases reported as *Congress of Railway Unions* v. *Hodgson*, 326 F. Supp. 68 (D.D.C., 1971), in which this Department participated. Moreover, in three cases presently pending, we have advanced this position against private parties who have asserted a private right to sue under Section 307 in a non-labor agreement case: *Parker* v. *National Railroad Passenger Corporation, et al.*, N.D. N.Y., Civil No. 72-CV-211; *City of New York* v. *N.R.P.C., et al.*, S.D. N.Y., Civ. No. 72-1988; and *Commonwealth of Pennsylvania, et al.* v. *Baker, et al.*, E.D. Pa., Civil No. 71-2301.

If appropriate, you are authorized to bring the contents of this letter to the attention of the Court of Appeals during oral argument on September 8, 1972.

Yours very truly,

E. GREY LEWIS
Acting Assistant Attorney General
Civil Division

By /s/ IRWIN GOLDBLOOM
Irwin Goldbloom
Special Litigation Counsel

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